

David H. Bodiker Lecture Series on Criminal Justice

Patrick J. Fitzgerald

Thank you Dean Michaels for the overly kind introduction. I'm going to call my wife today and tell her that the economy must be bad; it's amazing what people will endure for a free lunch.

I thought what I would talk about today is the topic of *Miranda* and terrorism. And the reason I want to talk about it is because the issue comes up now and again. When the issue about whether or not terrorism suspects should be read *Miranda* rights comes up after a particular episode there are usually strong feelings expressed, and then we move on from our episode and we don't really discuss it. Something about that debate has bothered me: people from both sides of the ideological spectrum will sometimes gloss over important issues, and I thought it was worth talking through.

So, let me start by just posing a very stark hypothetical. The hypothetical is this: It's a beautiful day in Columbus. At 9:00 tonight, what if something terrible happened? What if a plane landed at the Columbus airport, and you found out that a person was on that plane with a bomb, and fortunately the bomb didn't go off, but there is someone responding to it from the Columbus Police Department, the FBI is dispatched and is on the way, and now all the issues are going to unfold about how it is dealt with by law enforcement. What's going to happen is the police will call the FBI, the FBI agent will be reaching out to FBI headquarters to alert them, and meanwhile the U.S. Attorney's office will find out, probably from the FBI, that this is going on. A man or a woman working as the Assistant U.S. Attorney, maybe a graduate of this law school, probably younger in years, will be fielding a phone call from the FBI asking them "what do I do"? Maybe the agent is in a car, speeding to the airport and is simply calling ahead saying, "I want to let you know that we have a situation at the airport. There is a guy with a bomb. Thankfully everyone is safe. I'll be getting on the plane in about 10 minutes, and I've got a simple question for you: Do I read this guy his *Miranda* rights?"

Now, while this is swirling around, in the real life world there is a whole bunch of noise and communication going back and forth. The FBI agent is calling the Columbus Office, the Columbus Office is calling headquarters. Homeland Security (TSA) is probably calling their headquarters. Their headquarters are talking. The Department of Justice is finding out from the FBI Headquarters, calling into Columbus, either telling the Columbus Assistant U.S. Attorney what's going on first, or hearing about it first. In this confusion there will be a man or woman, an Assistant U.S. Attorney, who is asked that simple question: "Do I read this guy his *Miranda* rights?"

Let me just add a little bit more color before I pose a question to you. During those first moments, a lot of information will fly around. And the name of this

passenger may be run through the computer system. Assume that when they run the name through the computer system this passenger will turn out to be someone from Detroit; someone that the FBI had some sort of file or investigation open on; a suspected terrorist group that he's linked to. And assume that the CIA will come up with some general report that says: "There is noise in the system. People are talking about an attack that may involve somewhere in the Midwest, and somewhere in Texas, probably Houston, and it is something imminent." And that's what the Assistant U.S. Attorney is going to know . . . something bad is going on; something may be going on in multiple cities; and this person's on an airplane, and the FBI agent wants advice. So, since this person, who may have been taking it easy at home watching a football game, suddenly is dragged into a very critical situation and has to make a decision.

I'd like to ask the folks in this room, by a show of hands: How many of you think this suspect should be read his *Miranda* rights? Ok. And how many of you think that this person should not be read the *Miranda* rights? Ok. Most people answered. And how many people didn't raise their hand because they feel genuinely confused or conflicted both ways? Ok. What I want to do is talk for a moment about some of the underlying assumptions, but for the next question I won't ask you to raise your hand and answer. But I'd like you to put in a capsule in your mind the answer to this question. How long do you think it should take that Assistant U.S. Attorney to make that decision? Think in your mind about how many people you would want that person to talk with? No one? One person? How many? Who would they be? What considerations should go into their thinking? I ask you just to think about that for a moment . . . about how long you would allow . . . how many people to talk to and what should drive the decision. I'll come back to it at the end of this talk because I think that some of the things that may go into that decision may surprise you. With that in mind I would like to step back from this emergency situation to talk about policy.

I want to describe two different camps. I'm going to put things into two different camps even though people have views that are along a continuum. Not to mock either camp. I'm not setting up a straw man to tell you that people who care about civil liberties don't care about national security or that people that care about national security don't care about civil liberties. What I want to show is that from both points of view you will sometimes see they make common mistakes and assumptions about things that may not always be true. Or, they may overlook certain things.

So let me talk to you about what I would call the classic criminal law approach. Lots of folks, for very good reason, generally believe that you should just follow the law as we always have done. Part of our American nature is that we have a Constitution. We've had a Bill of Rights for two centuries. There is a reason we no longer report to the Queen. We said we want our own civil liberties. We want to be safe from unreasonable searches and seizures. That's who we are as Americans. Why change now? And, in fact, if we change now maybe we lose the war on terrorism. And besides being a very principled argument that makes

you feel patriotic about being an American, there is also an aspect about it that says: Hey, we have to win hearts and minds. How can we lead the free world and ask people to follow democracy if we sacrifice our values when we find it convenient. That's a very strong argument that says, "Treat these guys like everyone else and read them *Miranda*."

The second view looks at things and says: "Hey, we're at war." Recognize that we're at war. Different rules apply. We didn't Mirandize British soldiers during the Revolutionary War. We didn't Mirandize people in the battlefield in the Civil War or World War II, and we're not doing that in Afghanistan. When you're on the battlefield the law of war applies, not criminal law. I might point out that *Miranda* didn't exist for the better part of our history; that is a prophylactic rule designed to protect rights. This view says: "Look, the bottom line is there's a person sitting there and the information in their head might involve a ticking time bomb. It's absolutely crazy not to get that information out of them and save lives, and life is the ultimate civil liberty."

I would not deride either folks who want to follow a criminal law approach or people who want to follow the "we-are-at-war approach" for not being well intentioned and wanting to do things that are best for our country. What I do think is interesting about that is that if you follow that view you might say: "Well there's a simple policy call. We should just decide where we draw the balance." If it's a constitutional issue let the Supreme Court rule. If it's a matter of law, discretion, let's decide what's more important to us. You could put a sign up in a room that told Assistant U.S. Attorneys: If it's a terrorism suspect read them *Miranda* rights, or don't read them *Miranda* rights. If you thought that it might change from administration to administration you could have those signs like they have on the highway when the governor changes. You put the new name up, and you just sort of say: "we read *Miranda* rights," or "we don't." Then it's simple, and then the Assistant U.S. Attorney doesn't have the most challenging job, because they are told yes or no.

What I think is important to understand is there's a false assumption people make that every time you protect civil liberty you always cost national security. If you're going to give people *Miranda* rights—people who defend that don't like to say it out loud—but you're willing to risk the fact that you may have less national security. When we give *Miranda* rights to bank robbers, we realize that we may let a few more bank robbers go. We don't like to say it out loud, but if you give more *Miranda* rights to more terrorism suspects then maybe the price is there's a little bit more risk on the terrorism side. On the opposite side of things if you say "we want more national security" you're softly saying, then we're going to have to give up a little civil liberties in the process. People don't like saying that out loud either. We have this view that it's a zero sum game. Give up one, get the other.

What I would like to say is there's a false assumption that we treat terrorists like criminals. When I worked on mob cases, mobsters always took the Fifth. If they saw an FBI agent on the street, and he asked them the time of day, they take the Fifth. They don't want to say anything; they "don't want to say nothin' to

nobody.” They rather enjoy telling the FBI to get lost in colorful language. So that’s just what they do. Mobsters also are complete frauds and enjoy it being that way. When I worked mob cases, they had a coffee shop called the Café Giordino in Brooklyn. When an undercover agent went in and ordered coffee, he was told, “We don’t serve that here.” So you have coffee shops; you have social clubs, you have things that exist that no one actually follows through on because they are there to scheme. They’d rather work for four hours to steal a quarter than work half an hour to earn an honest dollar, because the art is in taking something that doesn’t belong to you.

Al-Qaeda is very different. Looking at Al-Qaeda over the years—when they had fronts, they used charities. They had nice sounding organizational names that said “Help African People,” or Mercy International.¹ They went into war torn areas with these charities, and no one would scrutinize them, because they had nice sounding names in areas that needed help. The reality is they did the charity work because their ideology was to help Muslims in those areas. So they would go into war torn areas like Somalia as charities and do the actual charity work. When there were raids done on some of the charities linked to terrorism, they would find records that they were there helping people fight malaria, digging wells, doing all sorts of stuff. They did both. And they like to talk. You probably saw in the news that Abu Anas Al-Libi was captured, remarkably, bravely a few days ago in Libya, in Tripoli. When I worked in New York, we indicted him as part of a group. Let me tell you about some of his co-defendants. One of them was a guy named Wadi el-Hage, a naturalized American citizen, who was a personal secretary to Osama bin Laden, and after he was identified as being of interest, we put him in the Grand Jury in New York. It’s now public, so I can talk about it . . . in 1997; we read him all his *Miranda* rights and he talked for hours. He lied like a rug under oath over many, many things. But he talked for hours after being told his rights. I got to speak to him beforehand. He tried to convert me to Islam. I tried to convert him to Team America as a witness. We were equally unsuccessful. But there was a lot of talking. One of his co-defendants in the trial was a guy named Mohamed Rashed Daoud Al-Owhali, who was one of the suicide bombers in Africa. Who, at the last minute, after he jumped out of the truck and watched his colleague hit the button and try to detonate the vehicle, ran for his life. He was supposed to die as a suicide bomber . . . a martyr. He was read his *Miranda* in Kenya. He fully confessed and insisted as a condition that he be brought back to America to stand trial to tell his story. His co-defendant confessed. Another defendant confessed in South Africa. A fellow by the name of Ali Mohamed, who worked seventeen years in the Egyptian military, joined the U.S. Army, became an American citizen, trained some of the World Trade Center bombers in New York, trained Bin Laden at the beginning of Al-Qaeda; trained al-Zawahiri, the current Al-Qaeda head, surveilled the embassies in Africa and did the surveillance with this fellow who was captured

¹ Note: there is a legitimate Mercy International, but there was an illegitimate group that used this name as well.

the other day in Tripoli. He was read his *Miranda* rights in the Grand Jury in 2000 and made a number of admissions about his role in Al-Qaeda. My point is that these guys are not mobsters. They talk a lot.

I don't mean to say that they'll always talk. People assume that if you read *Miranda* they'll never talk. What I do think we ought to recognize is you're looking at this from a perspective of risk management. And we should look at *Miranda* as both a strategy and tactical call and a legal and policy call. There's a decent chance that many of these folks will talk anyway. Now if you're arguing the National Security side, you might say, "Well, if the life of the country is at stake, why would you want someone to go out and have to throw a foul shot before hand?" and say, "If the ball goes in, we get to save our lives, but if he's one of the . . . however many percent that won't talk because of *Miranda*, why put ourselves at risk?" That's a fair point. What I think people fail to take into account is that when you make a *Miranda* decision—putting the law to the side for the moment, and we'll get there—one of the things you have to weigh is not only the risk that they might not talk, but what is the risk that if you don't Mirandize the person, he may walk free? In all the debates we've seen about *Miranda*, people don't realize that one of the purposes of the criminal law is incapacitation. Take a dangerous person off the street. That's particularly important, though mocked, in the terrorism arena. Do you really want a terrorist walking the street? In many cases, if you don't read *Miranda*, you may find out that the person makes a confession to activities that they engaged in that you cannot prosecute. My fear is that a lot of the media, bumper sticker version, that says "reading *Miranda* is dangerous" might actually cause someone reflexively to always not read *Miranda*. One day we'll have a terrorist who might have talked anyway, but who is not read *Miranda*, not successfully prosecuted, and will walk free in the streets before we learn the lesson that there's a plus side for national security for reading *Miranda* that causes someone to be incarcerated.

(My first slide: I wonder if you just thought you'd see the title the whole time.) The fellow, Ali Mohamed, the Special Forces guy who trained Bin Laden, surveilled the embassy in Africa with the guy just captured in Tripoli. When he was put in the Grand Jury in New York in 1998 . . . here's what he said in his guilty plea: "After the bombing in 1998 (referring to the two attacks in Nairobi and Tanzania that killed more than two hundred people), I made plans to go to Egypt and later to Afghanistan and to meet bin Laden. Before I could leave, I was subpoenaed to testify before the Grand Jury in the Southern District of New York. I testified, told some lies; I was then arrested." His being Mirandized and testifying falsely allowed him to be arrested before, literally, he boarded a plane overseas. His colleague, Anas al-Libi, who is not in the U.S., was just captured two days ago.

So when we keep a score card of national security benefits and the risks of *Miranda*, we forget to think about the incapacitation part.

The second thing we forget to think about is the fact that people who are arrested often provide intelligence. We have a well-honed criminal justice system

that, like it or not, gives strong incentives to people who are arrested, feeling the pressure of a future incarceration, to talk about their co-conspirators. We don't have that elsewhere, as refined, or as practiced. So the example I'd like to give is a case involving a guy named David Headley, that happened in Chicago several years ago, when I was working there as U.S. Attorney. David Headley may not be known to most of you. But he is a rather interesting person, an American, a person of American and Pakistani descent. He could pass as an American. He spoke fluent English. He could pass as a Pakistani because he spoke Urdu. He could dress to look American or Pakistani. He grew up in Philadelphia. One part of his family came from a long distinguished Pakistani heritage. The other branch came from a family, where I think his great-grandfather graduated from Annapolis with the highest honors. And he grew up as a typical American youth. He then got in trouble and became a drug dealer twice over; twice arrested on federal narcotics charges; twice became a cooperating witness. In the early 2000s he went over to Pakistan again, became radicalized, and began associating with a group affiliated with Al-Qaeda. Headley is an American citizen. He could pass freely in India without suspicion. He did all the surveillance on about six different trips, on behalf of a group called Lashkar-e-Taiba, that led to the attacks in November 2008 in Mumbai, in which more than 160 people were killed. He stalked all the hotels for the entrances; how to get in, how to get out, and how to carry out those very, very bloody attacks. He was living in Chicago in about 2009. An investigation led us to believe that Headley and someone else were planning to go to Denmark and orchestrate a plot to seize a newspaper in Denmark and to kill the editors in there because a cartoon offensive to Muslims had been published, as part of an operation led by someone who was deeply involved in the Mumbai attacks. It was going to be very, very ugly. They were talking about beheading people, throwing heads out of windows as a terrorist attack. Headley was arrested in the fall of 2009. He was arrested at O'Hare airport. He was brought downtown to the FBI. He was read *Miranda* rights. He was arrested at the time based upon the evidence that we believed he was going to engage in this attack in Denmark. He was not charged with the Mumbai bombings. The evidence that he might have had a role in that attack was thin at the time. Within thirty minutes of being arrested and Mirandized, he confessed to his role in the Mumbai bombings. He then proceeded to talk for two weeks, after being Mirandized each day. On video tape he admitted his role. He became a cooperating witness. He then testified at a trial of a colleague and, as publicly reported, he gave valuable intelligence.

Had he not been Mirandized, when his lawyers found out that he was being charged with a capital offense, any lawyer in their right mind probably would have told him to stop talking. When his lawyer was provided with evidence that he had confessed to these matters, had done so on tape after receiving *Miranda*, the dynamic had changed. Without *Miranda* the case against him might have been very different. Who knows if he would have been convicted? We certainly wouldn't have had the intelligence. We think of *Miranda* as a pure law enforcement, civil liberty issue. We forget that it has national security value. It

has intelligence value for saving lives. I always wondered what would have happened if Headley had been arrested four months later . . . because he was arrested in October. In December we had the underwear bomber in Detroit. It got a lot of attention, and people were saying on the airways, “how dare the FBI read that person his *Miranda* rights.” That was a different case, because the evidence was pretty strong, because he was caught with a bomb in his underwear . . . sort of hard for him to explain. You can try, but it’s hard. But I wondered after all that hue and cry about the purported folly in reading his *Miranda* rights what would have happened in Headley’s case, had it been different and Headley’s arrest came later.

I want to just end the strategic part with saying that I think the answer from a strategic perspective, or whether it’s smart from a national security safety point of view to read a suspect his *Miranda* rights, depends on the facts. It depends on whether the person knows anything about this individual, whether they think there is a preexisting case against him; in the Anas al-Libi case, the recent arrest, there already was an indictment and a trial. So people can have comfort. There’s a criminal case there. In the underwear bomber case you can have comfort. He was caught in the act. So in cases where there already is a preexisting case, and you need not worry about the person fleeing and escaping justice because there is no evidence, it may well make sense from a strategic point of view, if legal and ethical, not to read *Miranda* rights. To get a greater chance that you’ll get information. But in a case where the evidence may not be known, or it may be weak, maybe nonexistent, there is a serious risk that *Miranda* rights not being read might turn around and bite the government in a way that it did not anticipate.

The Attorney General’s guidance from 2010 it tells FBI agents that they should first ask all public safety questions, then read *Miranda* rights. If you look at the last line it says, “They should try to consult with the proper justice attorneys regarding the interrogation strategy.”² Generally I don’t like when people don’t give you a yes or no answer, they sort of say . . . “It depends.” But this is an area where it *should* depend.

Now, there is a very important part here that talks about public safety. That’s where we’ll talk about some case law for a moment. There’s this case called *Quarles* which has stood for the proposition that it’s ok to ask public safety questions without *Miranda*. It came up in a criminal context. I’d like to talk about that. First of all, to date myself, this case is so old I was in law school then. In *New York v. Quarles*, interesting facts . . . there was a woman who reported a sexual assault by a man with a gun, who then ran into a supermarket. The policeman saw this man, fitting this description in the supermarket and gave chase. The policeman had a gun. He is chasing this guy down the aisle. There’s three policemen following behind him. At a certain point, he turns the corner and finds the guy who gives up. The police officer points his gun at him; three other police

² Citing to October 19, 2010, Guidance from Attorney General Holder: “Guidance for conducting interviews without providing *Miranda* warnings in arrests of terrorism suspects.”

officers point their guns. They handcuff him, and they see an empty holster.³ So you now have the suspect surrounded by four police officers, in handcuffs, with no gun in his holster. One of the police officers says: "Where's the gun?" The suspect nods toward the shelf. They find it.⁴ The issue before the Supreme Court was, "well you never read him his *Miranda* rights before you asked him where the gun was, so does it get in?"⁵

First up, Justice Rehnquist, who in the majority opinion says: "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule for protecting the Fifth Amendment privilege."⁶ He goes on to say: "We think police officers can and will distinguish, almost instinctively, between questions necessary to secure their own safety or safety of the public and questions designed solely to elicit testimonial evidence from a suspect."⁷ So Rehnquist's view is "it's just instinct" to ask "Where's the gun?" So it's ok to ask, and therefore it gets in.

Now, in the debate about whether to read *Miranda* rights, some folks say: "It's just wrong" not to read someone *Miranda* rights. It's just illegal. Where are your constitutional rights? I will tell you that there was a view expressed in the Supreme Court that it is ok to deliberately not read someone *Miranda* rights to get information out of them. If I told you that a Supreme Court justice said that, I ask you to visualize who that might be, and what name he or she might have. I think you would be surprised to see it was Justices Marshall, Brennan, and Stevens . . . in the *Quarles* case . . . what they said was: "If a bomb is about to explode, or the public is otherwise imminently in peril, the police are free to interrogate suspects without advising them of their constitutional rights."⁸ So what may sound like a radical right wing view is a very much main stream, left of center view, from 1984. "Such unconsented questioning may take place, not only when police officers act on instinct"⁹—the "where's the gun"—"but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal lifesaving information."¹⁰ "Higher faculties" meaning . . . you tell him he has rights, he'll exercise them.

So, if you think he's going to do that, just don't tell him. "Nothing in the Fifth Amendment or decision in *Miranda* prescribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced

³ New York v. Quarles, 467 U.S. 649, 651–52 (1984).

⁴ *Id.* at 652.

⁵ *See id.* at 654–55.

⁶ *Id.* at 657.

⁷ *Id.* at 658–59.

⁸ *Id.* at 686 (Marshall, J., dissenting).

⁹ *Id.*

¹⁰ *Id.*

information at trial.”¹¹ So those justices were saying: if you think a person will invoke *Miranda* and safety is at stake, go ahead and ask the questions.

And then Justice O'Connor, I think hits the nail on the head and turns to the analysis and says: “*Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost securing the public safety when those questions are asked and answered, the defendant, or the state?”¹² I think she hits the nail on the head on this with two different questions: Do you want a police officer to be able to say: “Where’s the gun?” . . . it’s dangerous, and most people do think it’s ok to ask, “where’s the gun?” It doesn’t mean the answer has to come in as evidence. You sort of want the gun. The prosecutors would like it to come into evidence, but there are two separate questions that get blurred.

So, what we have in the *Quarles* context is this issue of public safety. Now what’s sort of interesting here is how do you define public safety in a terrorism context. What’s very interesting in *Quarles* is the public safety is from a gun on a shelf, with a guy six feet away, in handcuffs, surrounded by four police officers. What I find ironic as we come toward the future is how people will try to take this *Quarles* principle and apply it to the terrorism context. I think the folks from the left will adopt the briefs that were filed by the people from the right saying that “this was so dangerous,” and the people from the right will adopt all the old briefs from the people on the left saying “that wasn’t so dangerous.” But when you think about it, how do you draw the analogy between the guy with an empty holster to a terrorist who may know about someone then planning an attack immediately in some other city. Or what about the guy who was captured in the hypothetical? What if he doesn’t know that there is an attack happening in Houston in four hours, but he can tell you who the key Al-Qaeda courier is and this person could lead you to whoever the key Al-Qaeda people are in Iraq or Somalia or Afghanistan? He may not know what they’re doing, but he would know that they’re up to something no good. Where do you draw the line? In the *Quarles* case, there was some discussion about instinct by Rehnquist. The other justices say: “it doesn’t have to be instinct, it could be planned.” There is a key sense of imminence. Like the gun is just sitting there. Well the imminence in a terrorism context might be more delayed but far more lethal. I think what we need to see in the years to come as this is litigated, is how we deal with . . . how do you define what public safety is in a terrorism context? Can you debrief a suspect to ask him every person he attended a terrorism camp with in Afghanistan where they were learning explosives? The argument would be “Sure. That’s a whole lot of danger. Every one of those people walking around might be a ticking time bomb.” The counter argument is . . . “Well, where does it stop?”

If we look forward at some of the cases after *Quarles*, in the non-terrorism context, there was a case from 1995 where they admitted statements made four

¹¹ *Id.*

¹² *Id.* at 664 (O’Connor, J., concurring in judgment)

days after arrest because it was about a missing gun. Again the guy told the police where the missing gun was. But then it was offered against him at trial.¹³ In a different case, a suspect was beeped, back in the days of beepers, by accomplices who wanted to do a robbery. They ask the guy about the robbery. They prevent the robbery, and then they used the evidence against the guy who got beeped.¹⁴

The key part to whether it's legal for someone to decide not to read *Miranda* to someone who is in custody depends on when a *Miranda* violation occurs. We're all used to the Fourth Amendment that says "you can't kick someone's door down without a warrant" or some sort of exigent circumstance. In the Fifth Amendment context where someone is not read *Miranda* rights, the issue is when is the right violated (if it is violated)? Most of the Supreme Court cases have said the violation only occurs when the statement is admitted at trial. What that means is . . . if you have a right that your garage door doesn't get kicked down, then they can't kick the door down and say: "don't worry, we apologize sir, we apologize ma'am, I shouldn't have kicked your door down, but don't worry, we won't let the evidence in at trial." Your door has been kicked down, and you're not happy, and your constitutional rights have been violated. In the Fifth Amendment context when you talk about *Miranda*, if someone says: "We didn't read you your rights. We took the information, but we're not going to offer it at trial," that has usually stood the test of time.

So in the *Verdugo* case in the Supreme Court, they said *Miranda* violations only occur when you admit the statements at trial, because the Fifth Amendment says you can't be compelled to be a witness against yourself.¹⁵ If you're not a witness against yourself, no violation. There's been a little bit of softening on that. In 2003 this case . . . *Chavez* . . . a suspect got into some fight with a police officer. The suspect was shot in the face . . . very strange facts. Then the suspect was taken to the hospital, where he apparently was in extreme pain and appeared to think he was dying.¹⁶ I think there were tapes made of it. It appears the Supreme Court justices listened to the tapes. The other police officer, not the one who shot him, kept asking the questions, was insistent on wanting to know what happened; I can't quite figure out the context, but the suspect claimed that he thought that if he didn't answer the questions he wasn't going to get pain relief or medical care, and he made statements.¹⁷ The suspect was not prosecuted, which was pretty remarkable given that he'd [pointed a gun at a police officer].

So you don't know what the background facts were on this whole episode. But he sued for constitutional violations. So the plurality opinion said: "no violation."¹⁸ You weren't prosecuted, much less did they use the statements

¹³ *Trice v. United States*, 662 A.2d 891 (D.C. 1995).

¹⁴ *People v. Palmer*, 263 A.D.2d 361 (N.Y. App. Div. 1999).

¹⁵ *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

¹⁶ *Chavez v. Martinez*, 538 U.S. 760, 764 (2003) (plurality opinion).

¹⁷ *Id.*

¹⁸ *Id.* at 767.

against you, so how was *Miranda* violated? But three justices were offended enough to say that those facts constituted severe compulsion and violated the Fifth Amendment.¹⁹ The important issue is if the violation becomes a violation at the time of questioning. Then it would call into question the blessing that the Supreme Court has given to question people without giving them a *Miranda* when needed.

Two other cases, the *el-Hage* case was in 2008 after *Chavez*. That was the fellow who was Bin Laden's personal secretary. Judge Sand in New York held that you don't violate *Miranda* until you offer the statements at trial.²⁰ Now, one of the policy implications for that was that it applied *Miranda* overseas. Since the question was whether or not *el-Hage* was entitled to his *Miranda* rights overseas, the judge said it doesn't matter where you are; it matters where the trial is. So, with that in mind, let's talk about the underwear bomber case, where there was this public safety questioning for fifty minutes. It's really hard to know when public safety questioning will stop. There was fifty minutes of interrogation that included asking about the bomb, who made it, who he traveled with, who else might be planning an attack and whether he associated, lived with, or attended the same Mosque as others with similar mindset about jihad and Al-Qaeda. The statements were admitted.

My only point is that this is a grey area. There are very strong arguments that the government could make, that in the Al-Qaeda context everything associational involving someone with an Al-Qaeda mind set is of much more critical importance than a gun on a shelf in a supermarket. It is very removed from the factual predicate of *Quarles*, and we'll have to watch how that develops.

Ok. So, you may sit around and say to yourself: "well we've got this law that allows people to dispense with *Miranda* when they think safety is at stake. And we've got the strategic decision to make where some may think it's smarter for public safety to read *Miranda* or smarter not to read *Miranda*."

But there's one other thing out there that's a fly in the ointment. That affects what decisions prosecutors will make. It's called the McDade Amendment. After the prosecution of Congressman McDade, that was unpopular with Congress, Congress passed the McDade Amendment. It applied all the state bar rules to federal prosecutors. Now there was a hue and cry when that happened. Janet Reno was the Attorney General, and she made a statement that said this is basically a disaster. She wrote an editorial opposite someone from the ABA on the same day. She said subjecting federal prosecutors to differing state rules creates conflicts between federal and state law and rules, as well as among the law and rules of different states. Basically she was saying this is a bad thing. Now, I can tell you as a prosecutor that I firmly believed that at the time; I think I still believe in what she is saying. It doesn't really grip a layman to say: "Gee, you're under conflicting rules." The federal argument that gripped someone not familiar with

¹⁹ *Id.* at 789 (Kennedy, J., concurring in part).

²⁰ *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir. 2008).

the rules was from Martha Barnett, who was the head of the ABA, who pointed out that at the bottom there should not be one set of ethics rules for government lawyers and another set for everyone else.

So you have this debate when the rules apply to federal prosecutors. Let me give you two examples. The second of which is terrorism where it becomes a problem. First example was in Oregon. Oregon passed a bar rule that basically said that any kind of deceit by an attorney is a bad thing. But they applied it to undercover operations. So federal prosecutors had to shut down child pornography investigations in Oregon for fear of bar consequences from undercovers as a result. There was a whole battle about that in the early 2000s.

One of the model rules that, when adopted by a state, governs federal prosecutors is this rule: Rule 3.8(b) now on the screen. Rule 3.8b says "the prosecutor in a criminal case shall make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel." All but nine jurisdictions have adopted this in some form or another. Now I will tell you, if you read it carefully, there's a couple things in there that may not catch your eye at first. It says "the prosecutor in a criminal case." Most prosecutors thought that meant that began when the case got charged. You don't have a case until someone goes to court and they're arraigned. If you're just sitting in a police station asking someone if they robbed a bank, there is no case, so it doesn't apply. You're not a prosecutor, you're an investigator, or a lawyer investigating it, there's no case, no need to worry. The person is not accused. They're being interviewed in a jail house cell. That all sounds fine. You may also notice that it's more than *Miranda*. It's a little bit of super *Miranda*. It doesn't say you have a right to counsel only, but you have to tell the procedure for obtaining counsel, and give a reasonable opportunity for obtaining counsel. So more than just read the *Miranda* rights.

So what happens? My hypothetical before . . . we talked about a Columbus prosecutor, that Detroit prosecutor; there might be prosecutors involved from different states. If Texas was touched by the investigation, that Texas attorney is in this. The Main Justice prosecutor is probably someone from another jurisdiction. Here's what happened in a Wisconsin case. Not in a terrorism case, but a prosecutor had a case involving a defendant. He found out the defendant had a lawyer, but the lawyer was only for a preexisting case, and this was a new case. So, he checked, which was a good thing to do to make sure the guy wasn't represented then for the new matter. Then he had the defendant read his *Miranda* rights, even though I think he was not in custody. They might argue that he was in custody for something else. He made sure that the defendant understood his rights. This defendant, not represented by a lawyer, being advised of his rights, made a statement. The police didn't know about the process of telling him the process for getting a lawyer . . . something beyond *Miranda*. It gets to the Federal District court and the court interprets that rule, which has since been amended in a way I'll talk about in a moment, and says that it doesn't think that rule was limited to the Sixth Amendment right to counsel, and therefore appears to require prosecutors to

assure it covers in-custody suspects who have not yet been formally charged or advised of their right to counsel. So no longer was a criminal case limited to “an accused,” it applied to people in the precinct. And the district court found that the statements should be suppressed and found that prosecutors there should not be sanctioned because it was not egregious or highly improper or unconscionable. So the prosecutor was told that day, that what they did was unethical, but not that bad. It goes up on appeal, and the prosecutor does a little bit better, but not a great level of comfort: we’re doubtful if the prosecutors violated any ethical rules. Then the opinion goes on to say it’s ambiguous whether it applies in this setting of a pre-arrest, pre-charge interview, even if this was an ethical lapse, and again we’re not deciding that issue today, we see no reason to require suppression.

In my hypothetical, suppose a Wisconsin A.U.S.A. was on a telephone call being asked whether this person should be read his *Miranda* rights for a bomb suspect. He has to be thinking about the bar consequences of being part of something where you not only don’t read *Miranda* rights, but don’t tell him the fuller process. If she looks at a district court opinion that said “that’s a violation of the ethical rules,” but not an egregious one. And then sees an appellate opinion that says, “maybe not.” “We’re not sure . . . we haven’t decided it.” Then the A.U.S.A. will have to realize that Wisconsin has since changed the rule to expand it even further. The rule now says when communicating with an unrepresented person, the prosecutor shall inform the person of their rights. Note that the updated rule provides no public safety exception—no other exception. So, that rule sits out there in Wisconsin, basically saying to the Wisconsin prosecutor . . . “you can’t be part of an interview when *Miranda* is not involved.” The explanation for the Wisconsin rule? The paragraph was adopted to “expand the rule, by deleting a reference.” No further explanation of what that means.

If you go to Texas, it says: the prosecutor in a criminal case shall refrain from conducting or assisting in any custodial interrogation of the accused unless the prosecutor has made reasonable effort to assure that the accused has been advised of any rights in the procedure for obtaining counsel.

Again, no *Quarles* exception, no exception that says maybe you want to go ahead and not read *Miranda* and just not use the information. It’s a violation of Texas bar rules to proceed consistent with the guidance of Justices Brennan, Stevens, and Marshall or the Supreme Court decision.

Wyoming . . . similar effect: the prosecutor of a criminal case shall prior to interviewing an accused or prior to counseling a law enforcement officer who is expected to interview an accused, shall make sure this happens. In a case we won’t dwell on, *Harlow v. State of Wyoming*, guys are running a case, agents went to a prison. They came back and told the prosecutor that some guy asked to speak to them. Obviously, the prosecutors weren’t there. The agents spoke to him, but didn’t tell him his *Miranda* rights, and the Court found the violation, assuming that the prosecutor must have talked to these guys before they started their day.²¹ There

²¹ *Harlow v. State*, 70 P.3d 179, 192 (Wyo. 2003).

is a case in New Jersey, where a police officer had sexual contact with minor girls, and they told their father, who reported it, and other police officers began investigating the police officer, were told by the prosecutor they would arrest him eventually, but they wanted to interview him first. So they didn't place him under arrest, didn't tell him he was under arrest. The prosecutor said therefore you need not read *Miranda*. They didn't, and if anyone in the world should know what *Miranda* rights are, they would probably be a police officer, but the court said the prosecutor's decision not to read *Miranda* to a police officer was a deliberate and outrageous attempt on the part of the assistant prosecutors to ensnare defendants.²²

So you have out there some body of law that tells prosecutors you can't do what it appears that the Supreme Court might bless, or has blessed . . . Ohio does not have that problematic rule. The Ohio rules of professional responsibility simply say "we don't have that rule because ensuring that the defendant is advised of their right to counsel is a police and judicial function." Rule 4.3 sets forth the duty for all lawyers dealing with unrepresented persons. So in Columbus you wouldn't have that model rule problem, but if you're talking to an attorney in Wisconsin, an attorney in Wyoming or Texas, you might. And in fact, Kentucky has the rule, Indiana, West Virginia, Pennsylvania, and Michigan, and Tennessee in the Sixth Circuit have also adopted the rule.

I used to have a picture hanging in my office in the U. S. Attorney's office. It's art so you know I didn't pick it out . . . This was my picture [reveals slide of Jasper John picture of the map of the United States to audience] . . . and that to me is the state of law in the United States when it comes to these model rules. And what I mean by that I told you at the beginning . . . think about what things you would want to think about when deciding whether to read someone their *Miranda* rights. The notion that you're not thinking strategically, or tactically about whether we are safer by making sure this guy's incarcerated and read his rights and can use it against him, or is that too risky for fear that he won't talk; and tactically, do we want to not read his rights and get the information if we can't use it. And you want them to think about the law and say: "Is it legal? Does the Supreme Court say it's ok to have in your mind the idea that I won't read *Miranda* rights, try to find out about other bombers, but I won't use it against you?"

To have in the backdrop this fact, that there's a bunch of different rules around the states where someone would have to bring out the model rules and while the guy's driving to the airport, and they're sitting in their living room taking the night call as the Assistant U.S. Attorney in Columbus, and saying Ohio ". . . I think we didn't adopt that rule . . . who's on the phone from Texas?" is to me crazy. And the notion that the Attorney General's guidance says FBI agents should go talk to the lawyers is a good thing. But the bar rules simply say you're putting yourself at risk of being involved in a long conversation. So part of the unintended consequence of the bar rules could be to have people not talk to the lawyers for fear that the prosecutors won't give advice that is otherwise lawful out

²² State v. Sosinski, 750 A.2d 779, 785 (N.J. Super. Ct. 2000).

of fear of their own licenses. So, my question is: These rules did not appear to have been adopted with terrorism in mind. And so it might well be that a state may say that in the State of Ohio or Kentucky or Michigan, we have decided that if you look at that quote (that I didn't put up there on the stage, but is perfectly appropriate for this argument [referencing a quotation about civil liberties]) that it's more important that we feel very, very comfortable, that we convict no one without violating their constitutional rights.

So let's require more of our particular state before we put someone in jail for a bank robbery, and it's a part of the decision we've made and we're fine with it. If a couple of extra bank robbers get away over the years in our state, but we'll feel better about the process by which we pursue justice, we've done well. But in the world of terrorism, where people may be jumping from plane to plane to plane, the consequences in a terrorism context of disabling prosecutors from taking advantage of what the law currently allows, and putting it in a place that's sort of haphazard, that says in some states you can do it, and some states you can't, is troubling. The risk is not limited to your state The risk that you don't get information that protects a different state—to me is something that cries out for people in bar associations to look at.

So, my short answer in all of this—and there are other things I could talk about in terms of presentment—is, it seems to me the rational decision should be a strategic call with a legal policy call. We could all make arguments about what makes sense in the abstract and apply it in the concrete, but the two things that bother me that could cause people to make wrong decisions because of noise is the bumper sticker version we have of *Miranda* that makes everyone think that *Miranda* is always dangerous to give. I fear that someday a prosecutor under the pressure of time will think about the Detroit case and about the criticism that came from reading *Miranda* and say, well, when in doubt, don't read *Miranda*, and be afraid to say . . . you know what . . . the smart thing here would be to read *Miranda* and make sure that the confession is admissible and make sure that we can try and get timely intelligence. And that we're going to do that because of the noise in the system. People may be afraid of how it will read in the press.

The second noise, which cuts in the other direction, is having state bar rules, which complicate decisions for people who, under pressure of time, try to make a decision as what ought to be done. We don't want people—who decide that not reading *Miranda* is necessary to timely get intelligence—to now freeze because of potential bar consequences. Those are not easy answers. There's not a bright line rule. We can't put the sign up in the room that says "Always read *Miranda*" or "Don't," but I will tell you that the only other suggestion[s] that we've seen (from Congress . . .), [both of] which I think would have been a disaster, but weren't adopted. The first proposal was to say that before initiating a custodial interrogation of a person, the Attorney General is required to consult with the Director of National Intelligence, the Director of the National Terrorism Center, the Secretary of Homeland Security, and the Secretary of Defense. If any of the four believe that the action will interfere with the collection of intelligence related

to terrorism, the agent may not initiate such action without specific direction from the President. Given that the rules don't allow the admission of a confession begun more than six hours after an arrest, can you imagine the chaos that would ensue if someone from Columbus said, "Hold on FBI agent. I know you're only ten minutes from the airport, I've got to get the Attorney General out of bed, the Attorney General has to call four other cabinet members, each of [whose] default position by the system is risk avoidance, and so they have to own this. If they say, this will interfere with my job as head of national intelligence, they won't get blamed. So if they say I'm not so sure, we've got to get the President out of bed and have a cabinet meeting, which will then decide sometime after the six hours, what we should have done six hours ago was *Mirandize* or not *Mirandize*."

The notion is frightening that a law would cause a prosecutor not to interview this person because you're paralyzed by a statute that says, "everyone needs to consult before you do anything" is in effect to make a decision not to do either an interview with *Miranda* or an interview without *Miranda*, but default to no interview out of paralysis.

I end then by saying I think these are important issues. I think the civil liberties of the suspects themselves are valid. The civil liberties concerns that we feel comfortable about the process of how we proceed are valid, but the righteous concerns of those saying we need to get as much information as we can are also valid, and squaring those in a way that is fair, right, and just is hard enough without what I refer to as the noise in the system.

Thank you.